

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

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| In re: Application of Barre Gardens Holdings |) | |
| LLC and Barre Gardens Nursing |) | GMCB-020-15con |
| and Rehab LLC |) | |
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**CORRECTED ORDER CONDITIONALLY APPROVING
REQUEST TO AMEND CERTIFICATE OF NEED**

I. Summary

On January 13, 2017, the Green Mountain Care Board granted a certificate of need (CON) to Barre Gardens Holdings LLC and Barre Gardens Nursing and Rehab LLC (collectively, Barre Gardens). The CON allowed Barre Gardens to purchase the real estate and operations of Rowan Court Health and Rehabilitation Center (Rowan Court) from Revera Assisted Living, Inc. (Revera). On May 12, 2017, Barre Gardens notified the Board that the sale had closed over a week earlier and that the terms of the sale differed materially from those approved by the Board in the CON. Barre Gardens asked the Board to amend the CON to reflect the terms of the already-completed sale.

Barre Gardens was required to seek and obtain an amendment to the CON *prior* to closing. 18 V.S.A. § 9444(b); GMCB Rule 4.000: Certificate of Need, § 4.600. Its failure to do so has seriously limited the Board's options with respect to this request. In light of the facts and circumstances detailed below, however, the Board reluctantly grants the request to amend the CON, subject to several conditions.

II. Facts

The Board conditioned its approval of the CON on Barre Gardens' adherence to the project scope described in the application and other materials submitted during the application process, as well as on Barre Gardens' strict conformance to the Findings of Fact and Conclusions of Law set forth in the Board's decision. Certificate of Need, Conditions, ¶ 1. Several of the Board's findings are pertinent to the pending request. First, the Board found, based on Barre Gardens' representations, that the total cost of the project would be \$6,100,000. Statement of Decision and Order, Findings of Fact, ¶ 1 (citing App., Att. G, Table 1). Of this amount, the Board found that \$1.3 million would be financed with equity and the remaining \$4,800,000 would be financed through a HUD-insured loan from Graystone Funding Corp. *Id.* at ¶ 23. Barre Gardens represented in its application that the loan would bear interest at a rate of 4.5%. *See, e.g.*, App., Att. G, Table 2.

On May 12, 2017, Barre Gardens, through counsel, notified the Board that the sale had closed on May 3, 2017 and that the total project cost had come to \$6,909,349.20, over \$800,000 more than the Board approved. Letter from Shireen T. Hart (May 12, 2017). Barre Gardens

attributed three-quarters of this increase to a \$600,000 increase in the purchase price for Rowan Court. *Id.* It attributed the remainder of the increase to other unanticipated costs, including an additional \$201,696.24 in financing costs and an additional \$107,653.04 in legal costs, accounting costs, and application-related fees. *Id.* Barre Gardens also informed the Board that it would likely incur some additional future expenses in the wake of the closing, but that they are not expected to exceed \$25,000. *Id.*

With respect to the additional financing costs, Barre Gardens explained that instead of a \$4,800,000 HUD-insured loan from Graystone Funding Corp. bearing interest at a rate of 4.5%, it financed the purchase of Rowan Court with a \$5,400,000 private loan from Oxford Finance LLC bearing interest at a rate of approximately 7.99%. *Id.* Barre Gardens states that when it came time to finance the purchase, Greystone wanted Barre Gardens to own the property for 1-2 years before it would make the loan. Letter from Shireen T. Hart (June 14, 2017). Barre Gardens then began looking for a new lender and settled on Oxford Finance LLC. *Id.* Barre Gardens attributes the difference in the interest rates to the fact that it went from a HUD lender (i.e., Greystone) to a private lender (i.e., Oxford). *Id.* It also claims that “nearly 18 months elapsed between the initial representation [to the Board] about the interest rate and the final lending terms.” *Id.*

Barre Gardens maintains that its failure to request an amendment to the CON prior to closing was “the result of human error”; the VP of Finance for Priority Health Care, who was acting on Barre Gardens’ behalf in the sale, had “erroneously been operating under the premise that the CON approved a purchase price of \$6,600,000.” *Id.* Barre Gardens explained that when the purchase price for Rowan Court increased to \$6,600,000, that new price “erroneously became the operational number for both the purchase price and the CON approval for the VP of Finance.” *Id.* After the discrepancy was identified on May 5, 2017, Barre Gardens’ counsel took a week to investigate what occurred and determine the extent of any other cost overruns. *Id.*

III. Discussion

Any change in project cost that exceeds 10% of the total approved cost for a project is a “material change” that must be approved by the Board. 18 V.S.A. § 9444(b); GMCB Rule 4.000: Certificate of Need, § 4.600. The \$600,000 increase in the purchase price would not, by itself, have constituted a “material change” since it would only have increased the total project cost by 9.8%. However, with the additional financing and other costs, the total cost of the project has increased 13.2% (excluding the \$25,000 in expected future costs). As Barre Gardens recognizes, this is a “material change” that must be approved by the Board. Letter from Shireen T. Hart (May 12, 2017).

The 13.2% cost increase clearly relates to the “cost” criterion of 18 V.S.A. § 9437(2). However, it also implicates the “quality” criterion of 18 V.S.A. § 9437(4). In deciding to grant the CON, the Board recognized that Rowan Court was a struggling facility with a history of substandard care. Statement of Decision and Order, Conclusions of Law, ¶ III. The Board allowed the sale to take place in large part because it concluded that Barre Gardens would “provide a higher quality of care” than Revera. *Id.* at ¶ IV. The Board is concerned that, if approved, the increase in the total project cost will reduce the amount of money Barre Gardens’

can dedicate to operating the facility and this, in turn, will hamper its ability to deliver needed quality improvements. The Board therefore conditions its approval of the request to amend the CON on Barre Gardens maintaining an operating budget that reflects the projections it presented in its application. *See App., Att. BB.* The Board will also extend and modify the reporting requirements in the CON. Barre Gardens must file two additional semi-annual implementation reports beyond the two initially required in the CON. Each of these four reports must contain all the information required in the CON. *See CON, Conditions, ¶ 6.* Additionally, the second and fourth reports must include actual expense data for the prior calendar year (i.e., 2017 and 2018) so that the Board can ensure compliance with the new condition being imposed. Barre Gardens must explain any material deviations from its initial projections in these reports.

Barre Gardens failed to adequately explain why the purchase price for Rowan Court increased so significantly. It simply stated that the sale was the last in “a multiple-property deal” and the sale of the three other properties, which are located out of state, raised the price for Rowan Court. Letter from Shireen T. Hart (May 12, 2017); Letter from Shireen T. Hart (June 14, 2017). The Board is concerned that some portion of the overall cost increase may be attributable to the sale of the out-of-state properties and not to this project. The Board therefore also conditions its approval of the request to amend the CON on receipt of satisfactory documentation showing that the full cost increase is directly attributable to the Rowan Court sale. This documentation must be provided to the Board on or before July 31, 2017 and must include, at a minimum, a table showing the following information for each of the three out-of-state facilities and for Rowan Court: the original price, the final price, the difference between the original and final price, the specific reason(s) for the difference and the amounts associated with each cost item.

Because total project costs are increasing, the filing fee that Barre Gardens must pay to the Board under 18 V.S.A. § 9441(a) will correspondingly increase. The Board therefore conditions its approval of Barre Gardens’ request to amend the CON on payment of these additional filing fees. Barre Gardens shall inform the Board of the final project costs as soon as they are known. The Board will then issue a final assessment.

Under the CON statutes and rules, Barre Gardens was required to notify the Board of any changes it wished to make in the scope or cost of the project. 18 V.S.A. § 9444(b); GMCB Rule 4.000: Certificate of Need, § 4.600. Similarly, the CON required Barre Gardens to notify the Board immediately if it contemplated or became aware of a potential or actual change, material or nonmaterial, to the scope or cost of the project described in the application. Certificate of Need, Conditions ¶ 5. This did not happen. Instead, Barre Gardens came to the Board after the fact, seeking to conform the CON to the terms of transactions that had already occurred. Barre Gardens’ failure to seek prior approval from the Board has placed the Board in a very uncomfortable position in which it is forced to decide whether or not to approve changes that have already occurred and agreements that have already been executed. The Board Members are unanimous in their frustration with being placed in this position. At this time, the Board will not hold a hearing regarding the appropriateness of sanctions under 18 V.S.A. § 9445. However, the Board holds this open as a possibility if additional facts come to light regarding Barre Gardens’ failure to comply with the CON rules and statutes.

IV. Conclusion

Subject to the three conditions described above, the Board amends the CON it issued on January 13, 2017 to increase the total project costs to \$6,934,349.20 (\$6,909,349.20 incurred plus \$25,000 anticipated) and to reflect the terms of Barre Gardens' financing arrangement with Oxford Finance LLC. All conditions previously imposed by the Board in the CON remain in full force and effect.

SO ORDERED.

Dated: July 7, 2017 at Montpelier, Vermont.

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| <u>s/ Kevin Mullin,</u> |) | |
| |) | |
| <u>s/ Cornelius Hogan</u> |) | |
| |) | GREEN MOUNTAIN |
| <u>s/ Jessica Holmes</u> |) | CARE BOARD |
| |) | OF VERMONT |
| <u>s/ Robin Lunge</u> |) | |
| |) | |
| <u>s/ Maureen Usifer</u> |) | |

Filed: July 7, 2017